

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)**

THE NATIONAL FEDERATION OF  
THE BLIND  
200 East Wells Street at Jernigan Place  
Baltimore, MD 21230,

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Plaintiff,

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v.

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Civil Action No. 18-cv-2965

U.S. ABILITYONE COMMISSION  
1401 S. Clark Street, Suite 715  
Arlington, VA 22202-3259

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And

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THOMAS D. ROBINSON  
Chairperson  
In His Official Capacity  
U.S. AbilityOne Commission  
1401 S. Clark Street, Suite 715  
Arlington, VA 22202-3259

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And

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TINA BALLARD  
Executive Director  
In Her Official Capacity  
U.S. AbilityOne Commission,  
1401 S. Clark Street, Suite 715  
Arlington, VA 22202-3259

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Defendants.

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**AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

COMES NOW, Plaintiff, The National Federation of the Blind, Inc., by and through its undersigned counsel, and hereby brings this action against Defendants, U.S. AbilityOne Commission (“Commission”) (formerly the Committee for Purchase from People Who Are Blind or Severely Disabled), Commission Chairperson Thomas Robinson, in his official

capacity, and Executive Director Tina Ballard, in her official capacity, and in support thereof state as follows:

### INTRODUCTION

1. The AbilityOne program is a federal procurement preference program that requires all participating contractors to ensure that 75% of all direct labor hours by the contractor are performed by people who are blind or have severe disabilities. The term "direct labor" includes all work required for preparation, processing, and packing of a product, or work directly relating to the performance of a service; but does not include supervision, administration, inspection, or shipping. 41 U.S.C. § 8501(3). Federal agencies in need of the products or services available from an AbilityOne contractor are required to purchase from the AbilityOne contractor without competition. 41 U.S.C. § 8504.

2. Approximately 46,630 workers engage in contract work under AbilityOne. While hourly wages vary from less than \$5.00 to about \$15.00 an hour, nearly ten percent of these workers are paid less than minimum wage.

3. Currently, over 550 contractors participate in the AbilityOne program, and every year, the Commission awards them approximately \$3.3 billion in federal contracts for the sale of goods and services to the federal government.

4. The AbilityOne program was created by the Wagner-O'Day Act in 1938. The AbilityOne Commission (formerly known as the "Committee for Purchase From People Who Are Blind or Severely Disabled") is a federal agency, created by the Javits-Wagner-O'Day Act ("JWOD Act") in 1971, to oversee the AbilityOne program. 41 U.S.C. § 8501, *et seq.*

5. The JWOD Act authorizes the AbilityOne Commission to designate Central Nonprofit Agencies ("CNAs") to "facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among" qualified contractors. 41 U.S.C. § 8503(c).

6. Since 1938 and 1974, respectively, the contractors participating in the AbilityOne program have been managed by two CNAs – National Industries for the Blind (“NIB”) and SourceAmerica (formerly a consortium of organizations that developed into the “National Industries for the Severely Handicapped” or “NISH”). 41 C.F.R. § 51-3.1. NIB manages the relationships between and among the AbilityOne Commission and the contractors whose employees are blind. SourceAmerica does the same for contractors whose employees have other severe disabilities.

7. Each CNA is responsible for, *inter alia*, representing AbilityOne contractors before the Commission, evaluating their qualifications and capabilities, making recommendations to the Commission regarding products and services to be included on the Procurement List, distributing contracts among its contractors, and ensuring contract compliance. 41 C.F.R. § 51-3.2, *et seq.* Thus, CNAs are responsible for recommending to the Commission products and services to be included in the program and determining which contractors should receive the contracts.

8. The actions, or inactions, of CNAs have significant effects on how, when, and where the sizable contract revenues in the AbilityOne program are distributed. In addition, CNAs are required to assist the more than 500 contractors of the program “to meet the statutory and regulatory requirements” of participation in the program. Therefore, CNAs play a critical role in oversight and administration of the AbilityOne program. *Id.* at § 51-3.2(j).

9. CNAs perform responsibilities delegated to them by the AbilityOne Commission, but they are independent of the Commission and, until recently, did not have contractual agreements with the Commission. The Commission only has 27 full-time staff and relies heavily on the CNAs to plan, coordinate, and administer contracting and oversight functions, as specified in the program’s implementing regulations. 41 C.F.R. § 51-3.2, *et seq.* In this regard, CNAs bear the full delegated responsibility of facilitating by direct allocation, subcontract, or any other

means, distribution of the government's orders for products or services among the program's many contractors. *Id.*

10. NIB takes a fee of 3.9% of each contract awarded to one of its contractors, and SourceAmerica takes a fee of 3.85%. These fees provide approximately \$100 million annually in combined revenue to the CNAs.

11. NIB manages approximately 84 contractors eligible to receive contracts through AbilityOne, and SourceAmerica manages approximately 500 contractors. Together, NIB and SourceAmerica have more than \$100 million in reserves and assets.

12. In addition to their administrative duties, the CNAs may also act as prime contractors to federal agencies for products and services on the Procurement list, thus allocating federal contracts to themselves, for which they then choose subcontractors.

13. The AbilityOne program continues to be based on the assumptions about people with disabilities and about the nature of work existent at a time before the modern understanding of disability, before the enactment of modern disability rights laws, before the development of federal and state vocational rehabilitation programs and effective employment supports for people with disabilities in competitive integrated employment, and before the emergence of the information and technology-based economy of today.

14. AbilityOne contractors are out of step with current disability law and policy because they often do not provide reasonable accommodations to their workers with disabilities to allow them to increase their productivity, they often do not employ the tools of supported and customized employment to assist their workers with disabilities to be more productive, and they often do not support their workers with disabilities to move into mainstream competitive integrated employment.

15. AbilityOne contractors require many workers with disabilities to work in segregated facilities where the vast majority of workers are people with disabilities, and in segregated groups of people with disabilities within otherwise integrated facilities.

16. Although AbilityOne contractors are paid the fair market price for their products and services, many hold certificates under the Fair Labor Standards Act allowing them to pay below the prevailing wage, and 50 contractors pay below the minimum wage to their workers with disabilities.

17. Leading national organizations representing people with disabilities have called for reform of the AbilityOne program to increase integration of workers with disabilities as required by the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”), to use supported and customized employment techniques, to require payment of minimum and prevailing wages, to include contractors that are owned by people with disabilities in the program, and to increase oversight and transparency and eliminate conflicts of interest in the program. *See* <https://nfb.org/leading-organizations-americans-disabilities-call-reform-abilityone-program>.

18. The Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities also recommended to the Department of Labor and Congress to reform the AbilityOne program to align its outcomes with federal disability rights law and employment services best practices. *See* Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities, Final Report (September 15, 2016), available at [https://www.dol.gov/odep/topics/pdf/ACICIEID\\_Final\\_Report\\_9-8-16.pdf](https://www.dol.gov/odep/topics/pdf/ACICIEID_Final_Report_9-8-16.pdf).

19. The Government Accountability Office has found significant problems with oversight and transparency of the roles of the CNAs, which have only recently begun to be addressed. *See* Government Accountability Office, Report to the Committee on Oversight and Government Reform, House of Representatives, “Employing People with Blindness or Severe

Disabilities: Enhanced Oversight of the AbilityOne Program Needed” (May 2013), available at <https://www.gao.gov/assets/660/654946.pdf>.

20. In December 2015, the Consolidated Appropriations Act, 2016 (Public Law 114-113), required that the Commission enter into written agreements with the CNAs to increase transparency and oversight over the program, and specified that the AbilityOne Commission create an Office of Inspector General. As a result, in 2016 the Commission entered into Cooperative Agreements with National Industries for the Blind and SourceAmerica. Since 2016, the Commission has entered several modifications to the Cooperative Agreements with NIB and SourceAmerica.

21. In June 2016, the Department of Defense Office of Inspector General (“DoDIG”) issued an audit report about the AbilityOne program, OIG Audit Report, DODIG-2016-097, “DoD Generally Provided Effective Oversight of AbilityOne Contracts,” that identified problems with oversight and specifically documented the need to make the CNAs more accountable and transparent.

22. In 2017, Section 898 of the National Defense Authorization Act (“NDAA”) called for the Secretary of Defense to appoint a panel of senior level representatives from DoD (“Section 898 Panel”), the U.S. AbilityOne Commission, and other agencies and representatives, to address, *inter alia*, the problems identified in the DoD audit report including the effectiveness and internal controls of the AbilityOne Program related to DoD contracts (which comprise \$2.1 billion in prime contracts out of the program’s \$3.3 billion in contracts).

23. In June 2018, the DoD Section 898 Panel submitted its first report to Congress, recommending, *inter alia*: (1) “[m]ore oversight is needed of the CNAs”; (2) “[m]ore safeguards need to be in place to assure that CNAs do not show favoritism;” (3) “[i]ncrease transparency” in CNAs’ contractor recommendation process, (4) and significant program changes, including to the JWOD definition of “Qualified nonprofit agency for the blind,” to “create an integrated

employment environment.” Section 898 Panel, First Report to Congress, available at [https://www.acq.osd.mil/dpap/cpic/cp/docs/First\\_Annual\\_RTC\\_on\\_the\\_Panel\\_on\\_DoD\\_and\\_AbilityOne\\_Signed\\_18\\_July\\_18.pdf](https://www.acq.osd.mil/dpap/cpic/cp/docs/First_Annual_RTC_on_the_Panel_on_DoD_and_AbilityOne_Signed_18_July_18.pdf).

### **PARTIES & JURISDICTION**

24. The National Federation of the Blind, Inc. (“NFB”) is the oldest and largest national organization of blind persons. It is a 501(c)(3) non-profit corporation duly organized under the laws of the District of Columbia and headquartered at 200 East Wells Street at Jernigan Place, Baltimore, Maryland. It has approximately 50,000 members and affiliates in all 50 states, Washington, D.C., and Puerto Rico. The NFB and its affiliates are widely recognized by the public, Congress, executive agencies of state and federal governments, and courts as a collective and representative voice on behalf of blind Americans and their families. The organization promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually every sphere of life, including education, employment, family and community life, transportation, and recreation.

25. The ultimate purpose of the NFB is the complete integration of blind individuals into society on a basis of equality. This objective includes the removal of legal, economic, and social discrimination. One of the NFB’s primary initiatives is its Employment and Rehabilitation Program, with the goal of increasing the employment rate of working-age, legally blind adults and to develop innovative employment interventions and model rehabilitation programs that allow blind Americans to work and succeed in typical places of employment otherwise known as competitive integrated employment.

26. To further its mission and achieve these goals, the NFB operates three training centers: BLIND, Incorporated in Minneapolis, Minnesota; the Colorado Center for the Blind, in Littleton, Colorado; and the Louisiana Center for the Blind, in Ruston, Louisiana. Each offers

independence training programs, vocational rehabilitation programs, and training and employment programs for the blind, as well as public education programs about blindness. Like the NFB itself, they are guided by the philosophy that blind people are like everyone else and can be expected to perform on a par with everyone else when provided effective training, and to be employed by mainstream employers in the community. Graduates of these centers work in every conceivable form of employment.

27. Defendants are the Committee for Purchase from People Who Are Blind or Severely Disabled, also known as the U.S. AbilityOne Commission (“Commission”), current AbilityOne Chairperson Thomas Robinson, and Executive Director Tina Ballard. Mr. Robinson and Ms. Ballard are sued in their official capacities.

28. The Commission is an independent federal agency that oversees the AbilityOne Program (“AbilityOne”). AbilityOne was established by the JWOD Act to create employment opportunities for people who are blind or have severe disabilities.

29. As the Chairperson for the Commission, Mr. Robinson is responsible for its administration in accordance with law, including adoption of rules and regulations pursuant to the procedures set out in the federal Administrative Procedure Act, 5 U.S.C. Chapter 5, §§ 551, *et seq.*

30. As the Executive Director for the Commission, Ms. Ballard is responsible for its administration in accordance with law, including adoption of rules and regulations pursuant to the procedures set out in the federal Administrative Procedure Act, 5 U.S.C. Chapter 5, §§ 551, *et seq.*

31. This Court has subject matter jurisdiction over this matter pursuant to 5 U.S.C. §702 and 28 U.S.C. §§ 1331 and 2201.

32. This Court has authority to issue declaratory relief pursuant to 28 U.S.C. § 2201.



33. Venue is properly in this Court under 28 U.S.C. §1391(e)(1)(C), because the United States, its agencies, and its officials acting in their official capacity may be sued in the federal judicial jurisdiction in which the plaintiffs reside, so long as no real property is involved in the suit. For purposes of venue, an association is deemed to reside in the judicial district in which it maintains its principle place of business. 28 U.S.C. §1391(c)(2). Plaintiff NFB's principal place of business is in Baltimore, Maryland.

### **FACTUAL BACKGROUND**

34. Upon the signing of the Wagner-O'Day Act in 1938, NIB was incorporated as the designated CNA to represent contractors employing the blind and, until now, has been the exclusive CNA to act in this capacity for eight decades.

35. In 1973, the AbilityOne Commission issued regulations, after notice and public comment, re-designating NIB as the CNA to represent contractors employing the blind, and six organizations (Goodwill Industries of America, International Association of Rehabilitation Facilities, Jewish Occupational Council, National Association for Retarded Children, National Easter Seal Society for Crippled Children and Adults, and United Cerebral Palsy Association) as CNAs to represent the contractors employing people with other severe disabilities. 41 C.F.R. § 51-3.1 (1974); 38 Fed. Reg. 16318 (June 21, 1973); *see also* Notice of Proposed Rulemaking, 38 Fed. Reg. 6076, 6078 (March 6, 1973) (providing notice of and soliciting written comment on the proposed regulation that would designate these six agencies as CNAs).

36. In 1976, the AbilityOne Commission issued regulations, after notice and public comment, withdrawing the designation of the six organizations mentioned above and designating SourceAmerca (formerly NISH) as the sole CNA to represent contractors employing people with other severe disabilities. 41 C.F.R. § 51-3.1 (1977); 41 Fed. Reg. 26905-6 (June 30, 1976); *see also* 41 Fed. Reg. 21359-60 (May 25, 1976) (providing notice of and soliciting written comment

on the proposed regulation). During the same year, NIB continued as the designated CNA for the blind. *Id.*

37. After approximately 80 years of operating with a single exclusive CNA designated in regulations to represent blind Americans in the AbilityOne program—NIB—on July 26, 2018, the AbilityOne Commission announced that, without commencing a rulemaking process, it had designated the American Foundation for the Blind (“AFB”) as a new AbilityOne CNA and entered into a Cooperative Agreement (“Agreement”) with AFB, effective the same day. *See* “U.S. AbilityOne Commission Designates American Foundation for the Blind as a New AbilityOne Authorized Central Nonprofit Agency” (July 26, 2018), available at [https://www.abilityone.gov/media\\_room/documents/U.S.%20AbilityOne%20Commission%20News%20Release%20-%20New%20AbilityOne%20CNA%2020180726.pdf](https://www.abilityone.gov/media_room/documents/U.S.%20AbilityOne%20Commission%20News%20Release%20-%20New%20AbilityOne%20CNA%2020180726.pdf).

38. The Agreement dictates that AFB will move through three phases over the course of the next five years: Research and Studies (18 months), CNA Capability Development (30 months), and then finally Phase III, Transition to Full CNA Functionality (12 months).

39. The AbilityOne Commission designated AFB as a new CNA, and consequently entered into a contract with AFB, without public notice and opportunity for comment, and without following the federal statutes and regulations for entering into cooperative agreements or contracts.

40. Although the Agreement claims that it “provides a framework for a new CNA model in the AbilityOne Program that places the focus on increasing job placement and career advancement opportunities in knowledge-based positions,” the public has seen no proposal or other evidence that AFB is the organization best equipped to implement a new CNA model focused on propelling the blind into knowledge-based positions in competitive integrated employment.

41. The Agreement stipulates that AFB will require an 18-month “Research and Studies” phase to determine how to develop a new CNA model, before it can even enter Phase II to begin to execute some of the full functions of a CNA, as set forth in JWOD’s implementing regulations. During this Research and Studies phase, AFB is charged with identifying “innovative employment opportunities, careers and lines of business for people who are blind” and “identify[ing] multiple ways to identify blind veterans seeking employment, identify the type of employment they desire, and provide them employment.” The need for this “Research and Studies” phase indicates that AFB is not, in fact, currently qualified to operate as a CNA.

42. Despite AFB’s lack of qualification for the role of CNA, the Commission, through the designation and the Cooperative Agreement, has automatically granted AFB the role of CNA in 18 months, without competition or exploration of whether more qualified CNAs are available.

43. Through the Agreement, the Commission took the extraordinary step of exempting AFB from meeting the full regulatory requirements of CNAs for five years during initial phases of program development, even though the Agreement promises AFB that at the final phase it will be assured the full and active role of furnishing CNA services, including by working with contractors to place products or services on the procurement list and to collect fees for doing so.

44. If the Commission had provided adequate notice to the public of this opportunity, the National Federation of the Blind (“NFB”) would have submitted a proposal requesting that it be considered for designation as a CNA. Moreover, given its ample knowledge of innovative employment opportunities, careers and lines of business for people who are blind, and the interests and needs of blind veterans, NFB would not have required five years before it was qualified to meet JWOD’s regulatory requirements. The NFB is uniquely situated to implement a new CNA model with a focus on increasing job placement and career advancement

opportunities for blind people in knowledge-based positions in competitive integrated employment.

45. Designating AFB as a CNA without notice and comment effectively deprived the NFB and its members, the public, and other federal agencies, of the opportunity to provide comment about an important policy issue with corresponding and significant economic effects. In particular, interested and expert stakeholders were not permitted to comment about whether AFB is qualified to effectively identify knowledge-based jobs. Nor were public stakeholders and experts in the field given the opportunity to assess and advise the AbilityOne Commission about whether the selection of AFB would respond to the problems identified by the DOD Section 898 Panel with CNA transparency and accountability, and the need to ensure that employment opportunities are identified in “integrated employment environments.”

46. In addition, as CNAs maintain authority to provide oversight over AbilityOne contractors, the public was deprived of the opportunity to comment about whether AFB has sufficient arms-length relationships with current contractors to provide reasonably effective oversight. In fact, the Agreement assigns AFB the task of conducting research to identify, *inter alia*, “incorporat[ion] [of] accountability, oversight, and integrity into the government business model,” and asks AFB to report about internal controls and business ethics programs it has in place to prevent fraud, waste, and abuse by June 1, 2019. The Agreement does not indicate that AFB already has these structures in place. Nevertheless, without comment or public examination of these and other issues, AFB was designated as the agency that will receive CNA fees during Phase III.

47. While the Commission has the authority to “conduct continuing study and evaluation of its activities . . . to ensure effective administration” of the program, under 41 U.S.C. § 8503(e), this authority is statutorily distinct from its obligation “to designate a central nonprofit agency or agencies,” under 41 U.S.C. § 8503(c). Without recognizing this distinction,

the Commission granted AFB a non-competitively bid contract to study the program and, in turn, it at once converted that promise into a contract to eventually run the program, without notice and comment or compliance with the applicable grantmaking and contracting laws.

48. Because the CNA designation violates the federal Administrative Procedure Act (“APA”), 5 U.S.C. Chapter 5, §§ 551, *et seq.*, the federal Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. § 1.100, *et seq.* (“UAR”), or, alternatively, Federal Procurement Policy, 41 U.S.C. § 1708, and the Federal Acquisition Regulations, 48 C.F.R. § 1.101, *et seq.* (“FAR”), Plaintiff, on its own behalf and on behalf of its members who are or may benefit from the designation of a new CNA by the Commission, ask the Court: (1) to declare the designation of AFB as a CNA in violation of the law, (2) to enjoin Defendants from implementing the Agreement between the Commission and AFB, and (3) to enjoin Defendants to engage in notice and comment and in proper federal contracting and grant procedures to designate any new CNA.

### **LEGAL BACKGROUND**

49. The Commission may adopt rules, regulations, and policies to assure effective implementation of the JWOD Act. 41 C.F.R. § 51-2.2(a).

50. The Commission is directed by statute to “designate a central nonprofit agency or agencies to facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled.” 41 U.S.C. § 8503(c).

51. Federal agencies must comply with the requirements of the Administrative Procedure Act (“APA”) when adopting “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or

describing the organization, procedure, or practice requirements of an agency . . . .” 5 U.S.C. §551, *et seq.*

52. The designation of a Central Nonprofit Agency is subject to the APA’s requirements.

53. The APA requires that courts “shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...[or] without observance of procedure required by law...” 5 U.S.C. § 706(2)(A), (B), (D).

54. The APA requires that covered actions proposed by a federal agency must first be published in the Federal Register, with the terms or substance of the proposal, the legal authority for the proposal, and specific information regarding when a public hearing on the proposal will take place. 5 U.S.C. § 553(b), (d).

55. Under the APA, the proposing agency must give interested persons an opportunity to submit data, views, or arguments and must consider, prior to adoption of the proposal, the relevant information submitted by interested persons regarding the proposal. In adopting the proposal, the agency must provide a concise statement of its basis and purpose. 5 U.S.C. § 553(c), (d). This set of APA provisions for publication and consideration of comments is referred to as the “notice-and-comment requirement.”

56. The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. § 1.100, *et seq.* (“UAR”), govern grant awards and cooperative agreements by federal agencies. The UAR requires, *inter alia*, that, prior to entering into a cooperative agreement or competitive grant award, the agency publish notice of the opportunity, 2 C.F.R. § 200.203, establish and apply a merit review process, 2 C.F.R. § 200.204, and evaluate the risks posed by potential awardees, including their financial stability, quality of

management systems, history of performance, audit reports, and ability to effectively meet legal requirements, 2 C.F.R. § 200.205(b).

57. In designating AFB as a CNA and entering into a cooperative agreement with AFB, the Commission did not follow the pre-award procedures of the UAR.

58. Federal Procurement law requires any federal agency intending to enter into a contract exceeding \$25,000 to publish a notice of solicitation. 41 U.S.C. § 1708. The Federal Procurement statute also requires federal agencies conducting procurement for property or services to “obtain full and open competition through the use of competitive procedures in accordance with ... the Federal Acquisition Regulation.” 41 U.S.C. § 3301. The statute requires an agency preparing for procurement to “specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement” and designate its specifications for the procurement. 41 U.S.C. § 3306. The statute further requires solicitations to provide a method for submitting proposals. *Id.* at § 3306(b)(2)(B).

59. The Federal Acquisition Regulations (“FAR”), 48 C.F.R. §1.101, *et seq.*, implement the Federal Procurement statute and apply to all federal acquisitions of property or services. 48 C.F.R. §1.104; § 2.101. For federal acquisitions expected to exceed \$25,000, the FAR requires, *inter alia*, that the federal agency publish notice in the Governmentwide Point of Entry (“GPE”) website.<sup>1</sup> 48 C.F.R. § 5.201. The notice must be published at least 15 days prior to soliciting or proposing the contract action. 48 C.F.R. § 5.203(a). A federal contract solicitation must provide a response time sufficient to “afford potential offerors a reasonable opportunity to respond to each proposed contract action” but at least 30 days. 48 C.F.R. § 5.203(b), (c).

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<sup>1</sup> Currently, the GPE is the Federal Business Opportunities (“FedBizOpps”) website, available at <https://www.fbo.gov/>.

60. The FAR also requires, with limited exceptions not applicable here, that federal agencies “provide for full and open competition in soliciting offers and awarding Government contracts,” 48 C.F.R. § 6.101, and provides competitive procedural requirements. 48 C.F.R. §§ 6.100-6.102.

61. A non-competitive, or “sole source” contract may not be commenced unless the agency justifies its action in writing, certifies the accuracy and completeness of the justification, and gets approval. 48 C.F.R. § 6.303-1. Such a justification must be made public. 48 C.F.R. § 6.305.

62. The FAR provides for special acquisition requirements for contracts for services “which require the contractor to provide advice, opinions, recommendations, ideas, reports, analyses, or other work products [that] have the potential for influencing the authority, accountability, and responsibilities of Government officials. These contracts require special management attention to ensure that they do not result in performance of inherently governmental functions by the contractor and that Government officials properly exercise their authority.” 48 C.F.R. § 37.114.

63. If this Court finds that the cooperative agreement between the Commission and AFB is a federal contract, rather than an award covered by the UAR, the Commission did not follow the pre-contract publication requirements of the FAR, did not permit competitive bids, and did not properly justify a sole source agreement with AFB.

64. The Commission did not follow the requirements of the UAR, Federal Procurement statute, or FAR, as applicable, in its designation of and cooperative agreement with AFB.

65. 5 U.S.C. §702 creates a cause of action in federal court for any person who has suffered legal wrong because of, or been adversely affected or aggrieved by, an agency action or failure to act as required by the APA, the UAR, the Federal Procurement law, and the FAR. The



statute waives the sovereign immunity of the federal government for such a lawsuit, so long as the lawsuit is against a federal agency or a federal employee who acted or failed to act in her official capacity or under color of legal authority, and the suit does not request monetary damages.

66. 28 U.S.C. § 2201 permits this Court to issue a declaratory judgment that the Defendants have violated 5 U.S.C. Chapter 5, the UAR, the Federal Procurement law, and the FAR in naming AFB as a CNA, as identified below.

**FIRST CAUSE OF ACTION**  
**Violation of 5 U.S.C. Chapter 5, §§ 551, *et seq.*:**  
**(Failure to comply with notice and comment requirements)**  
**(for Injunctive and Declaratory Relief)**

67. Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

68. This Court is empowered by 5 U.S.C. §§ 702 and 706 to hold unlawful and set aside final agency action that the Court finds to have been adopted without observance of procedure required by law.

69. This Court is empowered by 28 U.S.C. § 2201 to declare the rights of Plaintiff and other interested parties regarding the issues presented in this Complaint.

70. The AbilityOne Commission is an “agency,” as defined under 5 U.S.C. § 551(1).

71. The designation of AFB as a CNA, resulting in the Cooperative Agreement between AFB and the AbilityOne Commission, is covered by the APA.

72. The Commission has violated the APA, 5 U.S.C. Chapter 5, §§ 551, *et seq.*, by designating AFB as a CNA without complying with the notice and comment requirements of the APA.

73. The adoption of AFB as a CNA is not merely an interpretation, a general statement of policy, or a statement of agency organization, procedure, or practice.

74. No public notice of designation of AFB as a CNA was provided to interested persons, and interested persons were given no opportunity to provide comment on it before it was adopted. No explanation, reason or rationale was provided for the unilateral designation.

75. Plaintiff has been injured in that the Commission designated a new CNA without Plaintiff having an opportunity to submit a proposal for CNA designation, as well as without Plaintiff, Plaintiff's members, or other members of the public having an opportunity to provide the Commission with their considered and experienced views on the proposed action.

76. Plaintiff is entitled to a declaratory judgment that the designation of AFB as a CNA as described in this Complaint was adopted without compliance with Chapter 5 of the APA, and is, therefore, illegal.

77. Plaintiff is entitled to an order vacating the designation of AFB as a CNA, enjoining Defendants from implementing that designation, and, requiring them, before attempting to adopt any similar provisions, to comply with the notice and comment requirements of the APA, 5 U.S.C. Chapter 5, §§ 551, *et seq.*

## **SECOND CAUSE OF ACTION**

### **Violation of 5 U.S.C. Chapter 7, §§ 701, *et seq.*:**

**(CNA designation is arbitrary, capricious, or otherwise not in accordance with law)**

**(for Injunctive and Declaratory Relief)**

78. Plaintiff repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

79. This Court is empowered by 5 U.S.C. §§ 702 and 706 to hold unlawful and set aside final agency action that the Court finds to be arbitrary, capricious, or not in accordance with law.

80. As discussed below, by designating AFB as a CNA and entering into a cooperative agreement with AFB without publishing its intent to do so or inviting other bids or applications, the Commission violated the requirements of the UAR, 2 C.F.R. § 200.205(b).

81. Alternatively, as discussed below, by designating AFB as a CNA and entering into an agreement with AFB without publishing a notice of its proposal to do so, without soliciting bids or providing a reasonable period in which to respond, without justifying a sole source contract, the Commission violated the Federal Procurement statute, 41 U.S.C. § 1708, and the FAR, 48 C.F.R. § 5.201.

82. Because it violates the UAR, or the Federal Procurement law and the FAR, the Commission's designation of AFB and Cooperative Agreement with AFB are not in accordance with law and, therefore, violate the APA.

83. The Commission's designation of AFB as a CNA is also arbitrary and capricious because the Commission has provided no rationale for its selection of AFB and no rationale for its selection of AFB without soliciting or considering other bids by more qualified applicants.

**THIRD CAUSE OF ACTION**  
**Violation of 2 C.F.R. §§ 1.100 *et seq.***  
**(Failure to Comply with the Requirements of the UAR)**  
**(for Injunctive and Declaratory Relief)**

84. The Federal Grant and Cooperative Agreement Act of 1977 provides that a federal agency must follow the rules for cooperative agreements when “(1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the ... recipient to carry out a public purpose of support or stimulation authorized by a law of the United States... and (2) substantial involvement is not expected between the executive agency ... and the ... recipient when carrying out the activity contemplated in the agreement.” 31 U.S.C. § 6304.

85. The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“UAR”), 2 C.F.R. § 1.100, *et seq.*, governs all federal awards, including federal agencies’ adoption of cooperative agreements such as the one between the AbilityOne Commission and AFB. 2 C.F.R. § 200.100(b); § 200.101.

86. The Commission has violated the UAR by entering into a cooperative agreement with AFB without first announcing the funding opportunity in a public notice, as required by 2 C.F.R. § 200.203.

87. The Commission has violated the UAR by entering into a cooperative agreement with AFB without first designing and executing a merit review process for applications, as required by 2 C.F.R. § 200.204.

88. The Commission has violated the UAR by entering into a cooperative agreement with AFB without first establishing a framework for evaluating the risk posed by AFB, including its financial stability, quality of management systems, history of performance, reports and findings from audits, and ability to effectively implement legal requirements, as required by 2 C.F.R. § 200.205(b).

89. The Commission has violated the UAR by failing to publish the required information regarding the Cooperative Agreement with AFB on [www.USAspending.gov](http://www.USAspending.gov), as required by 2 C.F.R. § 200.211(a).

#### **FOURTH CAUSE OF ACTION**

#### **Violation of 41 U.S.C. §§ 1708, 3301, 3306 and 48 C.F.R. § 1.101 *et seq.* (Failure to Comply with the Requirements of the FAR) (for Injunctive and Declaratory Relief)**

90. The Federal Acquisition Regulations (“FAR”), codified at 48 C.F.R. Chapter 1, govern acquisitions for all executive agencies. 48 C.F.R. § 1.104. Agencies can also adopt agency-specific acquisition regulations that implement or supplement the FAR. 48 C.F.R. §

1.101; § 1.301. The FAR are intended, *inter alia*, to ensure federal agencies “[c]onduct business with integrity, fairness, and openness.” 48 C.F.R. § 1.102(b)(3).

91. An “acquisition” subject to the FAR is defined as “the process of acquiring, with appropriated amounts, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency....” 41 U.S.C. § 131.

92. The Commission has violated the Federal Procurement law and the FAR by entering into a cooperative agreement with AFB without first publishing a presolicitation notice or notice of solicitation for proposals, or soliciting bids, as required by 41 U.S.C. § 1708(a)(2) and 48 C.F.R. §§ 5.201 and 5.204, or otherwise disseminating information by synopsis in the Governmentwide Point of Entry (“GPE”), as required by 48 C.F.R. §§ 5.101(a)(1) and 5.301(a).

93. The Commission has violated the FAR by entering into a cooperative agreement with AFB without providing a reasonable period to respond to the notice of solicitation, as required by 41 U.S.C. § 1708(e) and 48 C.F.R. § 5.203(b), (c).

94. The Commission has violated the Federal Procurement law by entering into a cooperative agreement with AFB before first considering other responsive and timely offers received in response to a notice of solicitation, as required by 41 U.S.C. § 1708(f).

95. The Commission has violated the FAR by entering into a cooperative agreement with AFB without first providing for full and open competition in soliciting offers and awarding the contract through the use of competitive procedures, as required by 48 C.F.R. § 6.101. *See also* 48 C.F.R. §§ 6.100-6.102.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff the National Federation of the Blind respectfully requests that this Court enter a judgment in its favor, and against Defendants, and:

- a) Declare that Defendants’ designation of AFB as a CNA and Cooperative Agreement with AFB violated the UAR or the FAR;

b) Declare that Defendants' designation of AFB as a CNA and Cooperative Agreement with AFB were not in accordance with law and beyond statutory and regulatory authority, in violation of the Administrative Procedure Act;

c) Declare that Defendants' designation of AFB as a CNA and Cooperative Agreement with AFB without complying with notice and comment requirements violated the Administrative Procedure Act;

d) Vacate and set aside the designation of AFB as a CNA and set aside the Cooperative Agreement Between the AbilityOne Commission and AFB, pursuant to 5 U.S.C. § 702;

e) Preliminarily and permanently enjoin Defendants, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, from implementing AFB as a CNA;

f) Preliminarily and permanently enjoin Defendants to comply with the notice and comment requirements of the Administrative Procedure Act and the UAR or FAR, as applicable, in the designation of any CNA;

g) Appoint a Special Master to review and ensure implementation of the Court order, specifically compliance with the notice and comment requirement of the Administrative Procedure Act and the requirements of the UAR or FAR, as applicable, in the designation of any CNA, so as to protect the rights of Plaintiff during the pendency of this action;

h) Retain jurisdiction over this action until implementation of this Court's order has been completed;

i) Award Plaintiff reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

j) Order such other and further relief that this Court may deem just and proper.

Respectfully submitted,

Dated: September 26, 2018

\_\_\_\_\_/s/  
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